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# In the Supreme Court of the United States

OCTOBER TERM, 1975

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, ET AL., PETITIONERS

*v.*

MOBIL OIL CORPORATION, MARINE TRANSPORTATION DEPARTMENT, GULF-EAST COAST OPERATIONS

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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On May 27, 1975, the Court invited the Solicitor General to express the views of the United States in this case. In response the United States filed a memorandum expressing the view that the petition should be granted, limited to the first question presented. Certiorari was granted without limitation on October 6, 1975. This brief elaborates upon the views expressed in our memorandum.

## STATEMENT

Mobil Oil Corporation is a New York corporation, and its top corporate offices are in New York City (App. 129–130). The Gulf-East Coast Operations Division of Mobil's Marine Transportation Department, which operates eight oceangoing American flag tankers, has its offices in Beaumont, Texas (App. 54–55). The tankers, which transport petroleum products, typically move from Texas to Atlantic coast ports, making several round trips per month. On any one voyage a ship is at sea for approximately four days and spends approximately 18 hours in port to load or unload (App. 117–119). Some of the tankers also move in foreign commerce on voyages lasting as long as six months (App. 120–121).

The 289 unlicensed seamen who work on the tankers are represented for collective bargaining purposes by Maritime Local 8–801 of the Oil, Chemical and Atomic Workers International Union (Pet. App. 1d, 2d). Sixty percent of the seamen seek employment at Mobil's Texas office and 40 percent seek employment at its New York office (App. 75–76).[1] The final hiring decision occurs in Texas, but this decision is only a formality for seamen applying in New York. The Texas office sets manpower requirements and keeps personnel records, but the New York office chooses the particular seamen (App. 74–76).

[1] 123 employees list Texas as their residence, 60 New York, 21 New Jersey, 16 Florida, 13 Louisiana, 10 Maine, and 10 Rhode Island; the listed residences of the remainder are scattered in 16 other States (App. 63–64).



Some of the seamen ship out of Atlantic ports, while others ship out of Gulf ports.[2] Personnel and payroll records are maintained by the Beaumont office (App. 65). Union dues checkoffs from those employees who have authorized them are made in Beaumont and mailed to the Union in New York (App. 158–161). Texas administers unemployment compensation on behalf of all the seamen (App. 93). Seamen's claims for maintenance and cure, health, accident, and other such benefits are handled in New York (App. 68–69).

The seamen perform all of their work aboard ship; they work for 85 days and then have 37 days of paid shore leave (App. 174, 180–181). The seamen are paid, in cash, on board the ship; they are paid every other trip, usually in a nothern port (App. 65, 67, 124–125).[3] The first four steps of the contract grievance procedure take place on board ship. The next step takes place in Beaumont; arbitration, should it be necessary, takes place in New York (App. 138–140).

In 1969, Mobil and the Union negotiated in New York a collective bargaining agreement covering the seamen who work on Mobil's tankers (Pet. App. 2d).

[2] The seamen designate home ports for purposes of computing transportation reimbursement for traveling between the port where they board or leave the ship and their residences. The home port is not necessarily the port where they actually board or leave the ship. 152 designate Beaumont as home port; 107 New York City, and 30 Providence, Rhode Island (App. 62, 64, 126–128; Pet. App. 3d).

[3] However, a seaman can request that a check be sent to his bank or his wife. In such event, the master will send a request to Mobil's payroll office in Dallas (App. 65).

The agreement contained an agency shop clause, which required all employees to become "members of the union and/or in the alternative pay the regular union dues and initiation fees within 31 days from the employment date" (Pet. 6).

Mobil brought this suit under Section 301 of the Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. 185, seeking a declaratory judgment that the agency shop clause violated the Texas right-to-work laws (Pet. App. 2c). The district court, finding that the seamen's Texas contacts outweighed those with any other State, held that the Texas right-to-work laws applied to the agreement and that the agency shop clause was consequently invalid (Pet. App. D).

A divided panel of the court of appeals reversed (Pet. App. B; 483 F. 2d 603). Drawing on *Western Electric Co.*, 84 NLRB 1019, and *Northland Greyhound Lines, Inc.*, 80 NLRB 288, the panel held that "the situs of the work performance of the covered employees" (Pet. App. 9b, 11b) was more important than the seamen's contacts with either New York or Texas, so that the "employees involved here are not for the purpose of their collective bargaining agreement employees of Texas or any other state—they are mobile, maritime employees, whose principal place of employment, or jobsite, is on the high seas" (Pet. App. 12b–13b).

The Fifth Circuit sitting *en banc* vacated the panel's judgment and, over six dissents, affirmed the judgment of the district court (Pet. App. A; 504 F. 2d 272). It held that "the federal labor legislation, the



predominance of Texas contacts over any other jurisdiction, and the significant interest which Texas has in applying its right to work law to this employment relationship warrant application of the Texas law and, consequently, invalidation of the agency shop provision" (Pet. App. 7a–8a). It rejected the panel's job situs approach because (Pet. App. 12a–13a), "if the congressional discussion on compulsory unionism could be said to have any single reference point, it is not job situs but the hiring process. And in our judgment, the language of section 14(b) which looks to the 'execution or application' of agreements requiring membership as a condition of employment refutes the notion that Congress was suddenly singularly concerned with the job situs of the employees rather than with the effects of such an agreement on men and women seeking employment in a mobile society."

The six dissenting judges pointed out that the majority's decision "give[s] extraterritorial effect to Texas' right-to-work laws" and adhered to the panel's view that maritime employment, "regulated in virtually all aspects by federal maritime law," should not be governed by state labor laws "when none of the employees work in the state" (Pet. App. 31a). Chief Judge Brown, in a dissent joined only by Judge Dyer, also argued (Pet. App. 34a) that "it would be better administration and more consistent with sound legal principles for the Court to refer this case to the NLRB under the doctrine of primary jurisdiction."

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ARGUMENT

## I. State Right-To-Work Laws May Not Be Applied to Seamen Who Work on the High Seas

### A. Introduction and Summary

The first proviso to Section 8(a)(3) of the National Labor Relations Act (NLRA), as amended (61 Stat. 140, 65 Stat. 601, 73 Stat. 525, 29 U.S.C. 158(a)(3)), makes lawful under that Act union security agreements that require union membership commencing 30 days after inception of employment. However, Section 14(b) of the Act, with obvious reference to Section 8(a)(3), declares that "Nothing in this Act" authorizes "the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." Section 14(b) thus permits a State, if it desires, to enact a more comprehensive ban on union security arrangements than does the proviso to Section 8(a)(3), which bars only the closed shop. This Court has held that agency shop provisions, which are privileged under Section 8(a)(3) (*National Labor Relations Board* v. *General Motors Corp.*, 373 U.S. 734), are "within the scope of § 14(b) * * * and therefore * * * subject to prohibition by * * * [state] law" (*Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 747). According to an opinion of its Attorney General (Br. in Opp. A1–A8), the right to work laws of Texas prohibit the agency shop.



The court of appeals held that the right-to-work laws of Texas apply to this collective bargaining agreement negotiated in New York which governs the relationship between a New York corporation and a group of workers who perform their work outside the boundaries of any State. It reached this conclusion because it thought that the majority of the workers had more extensive "contacts" with Texas than with New York or any other State. We submit that the court has applied the wrong test.

Under Section 8(a)(3) a union security clause in a collective bargaining agreement is lawful unless the State has interposed a different judgment about the extent to which its workers should be required to join or support a union as a condition of employment. The State is not entitled to impose its judgment upon all workers, however; it can overcome the national rule permitting union security clauses only if it has a significant interest in the work and workers involved. All members of the court of appeals agreed with this proposition.

In our view, the State's interest in overriding federal law and the desires of the union and the employer respecting union security is insufficient unless the work at issue is performed within the State in question. A contrary rule would allow extraterritorial application of state laws and would create the need, perceived by the court of appeals in this case, to "balance" the "contacts" of the many States that might have some legitimate interest in an employment

relationship. The court of appeals concluded that whatever State has the *most* interest in the employment relationship is necessarily entitled to apply its laws to the entire employment relationship. We submit that the proper question is whether any State has a *sufficient* interest in the employment transaction to be entitled under Section 14(b) to override federal law and the preferences of the union and employer. Since a State's interest is insufficient unless the employees work within the boundaries of that State, the judgment of the court of appeals should be reversed.[4]

### B. NATIONAL POLICY PERMITS UNION SECURITY AGREEMENTS, AND A STATE CAN APPLY ITS JUDGMENT TO THE CONTRARY ONLY IF IT HAS A SUFFICIENT INTEREST IN THE EMPLOYMENT RELATIONSHIP

Section 8(a)(3) of the NLRA provides in part that no law of the United States "shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day" of employment. This provision modified Section 8(3) of the Wagner Act (49 Stat. 452), which had permitted not only the union shop but also the closed shop, under which applicants could be required to be union members before being hired. The amendments were designed primarily to eliminate the abuses of the closed shop. See generally 93 Cong. Rec. 3553–

[4] For the reasons stated in point II, *infra*, pp. 23–24, we believe the National Labor Relations Board does not have primary jurisdiction in this case.



3562 (1947), reproduced in 1 Legislative History of the Labor Management Relations Act, 1947 (G.P.O., 1948) ("Leg. Hist.") 733–747; S. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947), 1 Leg. Hist. 412. But Section 8(a)(3) also expresses the policy of the United States that employers and labor organizations are at liberty voluntarily to agree to forms of union security other than the closed shop. See Representative Halleck's statement at 93 Cong. Rec. 3554 (1947), 1 Leg. Hist. 733: "the matter is to be left to free agreement" between the employer and the union. Cf. 93 Cong. Rec. 4885–4890 (1947), 2 Leg. Hist. 1418–1428.

The Court discussed the meaning of Section 8(a)(3) in *General Motors, supra,* 373 U.S. at 740–741:

> On the one hand, the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop. On the other hand, Congress recognized that in the absence of a union-security provision "many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost." S. Rep. No. 105, 80th Cong., 1st Sess., p. 6, 1 Leg. Hist. L.M.R.A. 412.

Section 8(a)(3) accommodated the competing interests by providing that "[a]s far as the federal law was concerned, all employees could be required to pay their way" (373 U.S. at 741).

Although the national policy embodied in the NLRA favored freedom of choice with respect to union security agreements, Congress recognized that some States had reached a different judgment about the desira-

bility of such agreements. Congress added Section 14 (b) to the NLRA "to forestall the inference that federal policy was to be exclusive" (*Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board,* 336 U.S. 301, 314). Section 14(b) "was designed to prevent other sections of the [NLRA] from completely extinguishing state power over certain union-security arrangements. * * * It was desired to 'make certain' that § 8(a)(3) could not 'be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy.' H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60, 1 Leg. Hist. L.M.R.A. 564" (*Schermerhorn, supra,* 373 U.S. at 751).

The confines within which the questions presented in this case must be resolved therefore are well-settled. The federal policy enunciated in Section 8 (a)(3) permits employers and unions to agree to union security clauses, and Section 14(b) permits States to override that policy. But for what employees can the State enforce a policy judgment contrary to that of Congress? Surely Texas could not, for example, impose its judgment upon employees of Mobil living and working in New York City, even if they had once lived in Texas and even if some of Mobil's corporate offices were in Texas. Just as surely Texas could not impose its judgment upon an employee working in New York City just because, many years ago, the formal "hiring decision" for that employee had been made in Texas. Still less could



Texas impose its judgment on an entire group of employees working in New York City simply because, many years ago, approximately half of the employees had been hired in Texas.[5] And if Texas cannot impose its judgment upon such a group of employees outside its borders, how can it impose its judgment upon the seamen involved in the instant case, all of whom work and are paid outside its borders?

The court of appeals approached this problem by comparing the "contacts" of what it perceived to be "competing" States. Texas had some contacts with the seamen involved here, and New York had some contacts. In this case, the court of appeals held, there were more "contacts" with Texas than with New York. The court of appeals would presumably deal with the hypothetical cases in the preceding paragraph by holding that in them New York has more contacts, and therefore New York's judgment would prevail over that of Texas. The court's approach is to enforce the judgment of whatever State may have the preponderant balance of "contacts."

This approach may well be the correct way to make a "horizontal" judgment, choosing between the laws

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[5] Approximately 40 percent of the seamen sought employment at respondent's New York office. Even though the "final hiring decision" occurred in Texas, this was only a formality for seamen applying in New York; the Texas office set manpower requirements and kept personnel records, but Mobil's New York representatives chose the particular seamen (*supra*, p. 2). Moreover, the seamen hired in New York can, and frequently do, ship out of other than Texas ports, and more than half of all the seamen list a State other than Texas as their residence.

of two or more arguably interested States.[6] But the court of appeals failed adequately to grapple with the "vertical" judgment—the question whether *any* State has a sufficient interest in the employment transaction to substitute its policy for the policy of Congress expressed in Section 8(a)(3). The horizontal question that can be resolved by a balancing of "contacts" is simply irrelevant unless both Texas and New York have an interest in the employment transaction sufficient to allow both States to override the national policy. For the reasons developed in Part C, *infra,* we submit that neither Texas nor New York has such an interest here.

The court of appeals' major answer to the problems involved in making the vertical decision was its argument that, unless some State could apply its laws to employment of seamen on the high seas, then the court would have created an "exemption" for maritime employment. That would be impermissible, the court reasoned, because when Congress has desired to exempt an industry from state right-to-work laws it has done so explicitly. See Pet. App. 18a–19a. We sub-

[6] One commentator has approached the horizontal problem of choice among competing States by suggesting that, since the hiring process takes place in both Texas and New York, and both States have a large number of affected employees as residents, the problem should be resolved by applying both Texas' and New York's union security laws to the Company's work force. Under this proposal, members of the same crew, subject to the same contract, would be governed by opposing union security rules. Note, 88 Harv. L. Rev. 1620, 1629–1630 (1975). This proposal, with its potential for disruption of labor-management relations, has no support in the statute or its legislative history. And, in any event, this case involves the vertical choice rather than the horizontal one.



mit that this rationale begs the question. To argue that no State has a sufficient interest in particular employment is not to argue for an "exemption" from anything. Section 8(a)(3) states the general rule—a rule that union security clauses are permitted. It is the *State* that seeks to create an exemption from this general rule by invoking whatever powers were reserved to the States by Section 14(b). There is no logical reason why at least one State must have the power to exempt every employment transaction from the rule of Section 8(a)(3).

The provision of the Railway Labor Act (45 U.S.C. 152 Eleventh) taking rail employment out of the reach of the state authority, upon which the court of appeals relied, was addressed to quite a different problem—because railway workers often passed through many States in the course of their employment, there were many States with competing (and sufficient) claims to apply divergent union security laws to an employment transaction that took place within all of them. There was, in other words, a difficult horizontal problem. Congress resolved it by preempting all state laws. That it resolved a horizontal problem in such a fashion is not an argument in support of the court of appeals' resolution of the vertical problem here.

Moreover, the court of appeals' belief that the position we take here would produce an exemption for "the maritime industry" (Pet. App. 18a) is incorrect. States could continue to apply their right-to-work laws to many elements of the "maritime industry": longshoremen, tugboat crews, and crews of ships

upon intrastate waterways could be subject to state rules, as would shore-based administrative personnel.[7] The "bizarre consequences" (Pet. App. 18a) that the court attempted to avoid could not come about.

We therefore turn to what we believe to be the dispositive question—whether Texas has a sufficient interest in the relationship between Mobil and its seamen to allow it to preclude them from voluntarily agreeing to an agency shop clause.[8] This vertical ques-

[7] As this illustration indicates, we agree with the court of appeals that the fact that seamen usually are governed by uniform and federal maritime law is not an argument against the application of state right-to-work laws to the maritime industry. We do not agree with the dissenting judges (Pet. App. 25a–27a) that all maritime employment is outside the scope of state power. This Court has precluded state interference with maritime commerce only when pervasive federal regulation or the nature of the endeavor necessarily requires rules of uniform applicability. See *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 337–344; *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 738–739; *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 444. Cf. *American Radio Association* v. *Mobile S.S. Association, Inc.*, 419 U.S. 215; *Windward Shipping* v. *American Radio Association*, 415 U.S. 104. Section 14(b) expressly permits diversity of regulation concerning union security and contains no exemption for maritime workers in general (compare the Railway Labor Act, which contains such an exemption (45 U.S.C. 152 Eleventh)); nor would maritime commerce necessarily be disrupted or hindered by the application to different ships or employers of different union security rules.

[8] The court of appeals believed that the question was whether it was "the intent of the Congress to *prevent* Texas from applying its right to work law in the context of this employment relationship" (Pet. App. 7a; emphasis added). As we have indicated, this seems to put the question backwards. And, in that form, the question breeds needless complexities. We would have to ask: was it the intent of Congress to prevent New York from applying *its*



tion can be resolved without regard to whether Texas has more "contacts" with the seamen than does New York.

### C. A STATE HAS A SUFFICIENT INTEREST IN THE EMPLOYMENT RELATIONSHIP ONLY IF THE EMPLOYEE PERFORMS SOME WORK WITHIN THE STATE

Shortly after enactment of the Taft-Hartley amendments to the NLRA, the Board was faced with the problem of determining the circumstances under which Section 14(b) permits a State to apply its right-to-work laws to an employment transaction. The Board was required by Section 9(e)(1) of the Act[9]

law (which allows union security agreements) to this employment relationship? It invites the observation of Judge Ainsworth (Pet. App. 30a, n. 21): "the majority opinion does not fully explain how Congress could fairly be said to have intended that a New York employee of Mobil, who resides in a state where his employment contract was entered into and where the agency shop provisions are permissible, and who performs no work whatever in Texas, should be prohibited by Texas law from enjoying the benefits of an agency shop provision in his employment contract."

[9] This provision (29 U.S.C. (1946 ed., Supp. I) 159(e)(1)), which was repealed in 1951 (Pub. L. 82–189, 65 Stat. 601), provided: "Upon the filing with the Board by a labor organization, which is the representative of employees as provided in Section 9(a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer."

to conduct union shop authorization elections. In *Northland Greyhound Lines, Inc.*, 80 NLRB 288, the Board considered the applicability of state union security laws to interstate bus drivers, and concluded (*id.* at 291):

> In resolving the question as to the applicable State law, such factors as the residences of the employees, the places where they were hired, their headquarters, the proportions of working time spent in the various States, and (with regard to the drivers), their routes, have been given consideration. In view of all the circumstances involved, we are persuaded that the headquarters of the employees provide the best criteria because they represent the focal points of the employment relationship. The headquarters are where the employees report to work, receive their instructions, and are paid their salaries. It is, therefore, in the States in which they have their headquarters that the provisions of any agreement between a union and an employer regarding the employees involved will be effectuated. In view of the fact that most of the essential matters with respect to the employment relationship will be dealt with in the States where the employees have their headquarters, we believe that application of this test to determine which State law shall control will result in the least amount of extra-territorial effect being given to the laws of one State as against those of another. [Footnote omitted.]

Accordingly, the Board directed that "all employees whose headquarters are located in States having legislation prohibiting union-shop agreements should be excluded from the unit hereinafter found appropriate" (*ibid.*).



In *Western Electric Co.*, 84 NLRB 1019, 1022, decided the next year, the Board held that the "job site, as that is where [the employees] report for work, receive their instructions, and are paid their wages," was the "headquarters" for the company's field equipment workers. The Board rejected a contention that those employees, who worked in 45 states and were subject to frequent transfers, all should be subject to the laws of the State where their employer had its main office (*id.* at 1023, n. 15). See also *Giant Food Shopping Center, Inc.*, 77 NLRB 791.

These cases, to be sure, involved the horizontal choice among competing States, rather than the vertical choice between state law and federal law. But the Board approached the question by recognizing that the horizontal problem arises only if a worker performs work in two or more States—in other words, a State does not have a sufficient interest in a particular group of employees to warrant application of the State's union security laws to them unless the individual employees work within that State. Only if two or more States have a sufficient interest is it necessary to decide which interest is the greater. That can be done, the Board held, by looking to the "headquarters" of those who perform work in two States. The Board's test, unlike that of the court of appeals, minimizes the extraterritorial effect of state regulation on union security agreements, while at the same time preserv-

ing for each State the right to confer the benefit of that regulation on its own work force, that is, the employees working within the State's boundaries. The Board's test also has the virtue of simplifying decision making, rather than creating an *ad hoc* analysis, the outcome of which cannot be foreseen while a collective bargaining agreement is being negotiated.

The Board's "job situs" or "headquarters" test is supported by the scanty legislative history of Section 14(b). The House committee report (H.R. Rep. No. 245, 80th Cong., 1st Sess. 34 (1947), 1 Leg. Hist. 325) states that union security clauses "are valid only if they are valid under the laws of any State in which they are to be performed * * *." A union security clause could be "performed" only where the work is done or where the dues are collected and sent to the union. Here, all of these events take place outside Texas. The work is performed at sea; the dues are deducted from wages paid at sea; the dues are mailed to the Union in New York. The conference committee report (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60 (1947), 1 Leg. Hist. 564) states that no part of the NLRA "could be said to authorize [union security] arrangements * * * *in* States where such arrangements were contrary to the State policy" (emphasis added). Read in context, this passage appears to denote the State in which the work is being performed.

The court of appeals sought to distinguish *Northland Greyhound* and *Western Electric* on the ground that the "issue raised in those cases * * * was not whether some state law applied to the employment



relationship but *which* state law applied" (Pet. App. 5a, n. 5). But this distinction assumes that "*some* state had to meet the criteria of 14(b)" (Pet. App. 34a, n. 6; Brown, C. J., dissenting; emphasis added). There is no reason why this must be so. If, as we have shown, the purposes of Section 14(b) are best effectuated by holding that a State has a sufficient interest in applying its policies with respect to union security clauses only to those working within its boundaries, then no State can establish such an interest with respect to seamen who perform their work on the high seas, beyond the boundaries of any State. Chief Judge Brown correctly observed in dissent (Pet. App. 33a–34a):

> Section 8(a)(3) expressly sanctions as a matter of federal policy union shop agreements with the important limitation that such agreements will not be valid "as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." While noting this "tension" between federal and state policy, the Court starts and finishes with the tacit assumption that the Court must find *some* applicable state law—almost in a conflicts-of-law analysis. The basis for that assumption is in no way discernible from the Act itself or its legislative history. Instead, the emphasis of the Act is that union security agreements are of such importance that absent state proscription outlawing union shop employment relationships within that state, they will be favored. The job situs rule, though never before applied in

precisely this situation, is merely a logical distillation of § 14(b). [Footnote omitted.]

The court of appeals held (Pet. App. 11a–12a) that the place of hiring, rather than the place of work, should be the touchstone for purposes of Section 14 (b). It believed that the amendments to the National Labor Relations Act reflect congressional concern with the effects of compulsory unionism on the hiring process, and particularly with abuses in maritime union hiring halls. See S. Rep. No. 105, *supra,* at 6–7, 1 Leg. Hist. 412–413. But the legislative history marshalled by the court of appeals is irrelevant to the power of the State under Section 14(b). Section 14(b) was not the means Congress selected for eradicating abuses in the hiring process. Congress sought to deal with abuses in hiring by amending Section 8(a)(3) to outlaw the closed shop and to provide safeguards under the union shop and lesser forms of union security which were permitted as a matter of federal law (and which most of the States have chosen not to displace under Section 14(b)).

Thus, in explaining the provisions of the Senate committee bill, which were ultimately adopted, Senator Taft stated (93 Cong. Rec. 4885–4886 (1947), 2 Leg. Hist. 1420):

> * * * [I]t abolishes the closed shop, insofar as that means that only members of the union can be employed. *That is the hiring-hall proposition.* But the bill permits the union shop * * *
>
> In the bill we say that the employee must join the union within 30 days after he is employed.
>
> We say that if at that time the union will not admit the employee as a member of the union, on the same terms and conditions as those on which any other member of the union is admitted to it nevertheless the employer can continue to employ that man. * * *
>
> * * * We further provide in the bill that if a man is fired by the union for some reason other than nonpayment of dues, the employer does not have to discharge him. * * * [Emphasis added.] [10]



Section 14(b) was merely designed to permit a State which so desired to relieve its workers, once they were hired, of any obligation to join a union and pay dues and fees to it as a condition of continued employment.

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[10] See also the following colloquy between Senators Donnell and Taft (93 Cong. Rec. 4886 (1947), 2 Leg. Hist. 1421):

"Mr. DONNELL. * * * Under the bill as it is now written, an agreement providing that an employer would not employ anyone who was not already a member of the union would be invalid, would it not?

"Mr. TAFT. That is correct. I think the most direct case of that sort is to be found in the maritime industry on the Pacific coast. The testimony was that a provision similar to the one the Senator from Missouri has referred to led to a condition on the ships engaged in the Alaskan run, where there was no discipline whatever; a man might be discharged for action contrary to good discipline, but in a few days he might be back in the hiring hall, and then the shipping line might be compelled to employ him again. Of course, under such an arrangment a man could not even get a job unless the union admitted him to union membership. The bill will make such a contract illegal."

Section 14(b) was not directed to the abuses of the hiring process.[11]

That Section 14(b) is directed at union security agreements, and not at the hiring process generally, is confirmed by the cases holding that a hiring hall not conditioned on union membership (and therefore lawful under federal law, see *Local 357, Teamsters* v. *National Labor Relations Board,* 365 U.S. 667) may not be regulated or forbidden by a State under Section 14(b), even if the hiring hall is used for job referrals within that State. *National Labor Relations Board* v. *Tom Joyce Floors, Inc.,* 353 F. 2d 768, 770–771 (C.A. 9); *National Labor Relations Board* v. *Houston Chapter, Associated General Contractors of America, Inc.,* 349 F. 2d 449, 452–453 (C.A. 5), certiorari denied, 382 U.S. 1026. Nor may a State regulate check-off arrangements pursuant to the authority conferred under Section 14(b). *SeaPAK* v. *Industrial, Technical & Professional Employees, Div. of N.M.U.,* 300 F. Supp. 1197 (S.D. Ga.), affirmed *per curiam,* 423 F. 2d 1229 (C.A. 5), affirmed without opinion, 400 U.S. 985.

[11] Answering the charge that, from the standpoint of the individual employee, there was no real difference between the closed shop and the union shop, Senator Taft stated (93 Cong. Rec. 4886 (1947), 2 Leg. Hist. 1422):

"The great difference is that in the first instance a man can get a job without joining the union or asking favors of the union, and once he has the job he can continue in it for 30 days, and during that time the employer will have an opportunity to ascertain whether he is a capable employee. The fact that the employee will have to pay dues to the union seems to me to be much less important. The important thing is that the man will have the job. * * * "



In sum, because the location of the employees' jobsite is controlling for purposes of Section 14(b), and because the seamen here work on the high seas, the Texas right-to-work laws cannot properly be applied to them.

## II. The Board Does Not Have Primary Jurisdiction of This Case

This Court held in *Smith* v. *Evening News Association,* 371 U.S. 195, 197–198, that federal courts have jurisdiction to determine the validity of a provision in a collective bargaining agreement even though the dispute may also involve an unfair labor practice within the Board's jurisdiction. Cf. *Connell Construction Co.* v. *Plumbers Local No. 100,* 421 U.S. 616, 626; *Retail Clerks* v. *Schermerhorn,* 375 U.S. 96, 102–105. The court of appeals therefore correctly held that the jurisdiction of the district court to determine the validity of the agency shop clause here was not preempted by whatever parallel authority may be lodged in the Board.

Chief Judge Brown suggested (Pet. App. 34a–36a) that the district court should have deferred to the primary jurisdiction of the Board. But such deferral would presuppose the availability of a Board procedure for resolution of the issue in question. *Local No. 189, Meatcutters* v. *Jewel Tea Co.,* 381 U.S. 676, 687–688. The Board has no generally available procedure for resolving questions of this sort. Although the parties could have sought an advisory opinion, such proceedings generally have been entertained by the

Board only for determining whether the amount of commerce involved in a case would satisfy the Board's discretionary jurisdictional yardsticks. See, *e.g., National Bulk Carriers, Inc.*, 134 NLRB 1186; *Jemcon Broadcasting Co.*, 135 NLRB 362, 367; *Connecticut State Board of Labor Relations and Hartford Building Maintenance Co.*, 145 NLRB 1415.

As the Court observed in *Jewel Tea, supra,* 381 U.S. at 687, a private litigant cannot ensure Board determination of an issue, for "[i]t is the function of the Board's General Counsel rather than the Board or a private litigant to determine whether an unfair labor practice complaint will ultimately issue." What is more, even should the General Counsel bring a case of this sort before the Board, it is far from clear that the Board could resolve the dispute, because maintenance of a union security clause alleged to violate state law generally is not an unfair labor practice under the NLRA if the clause satisfies the requirements of Section 8(a)(3). See *Retail Clerks* v. *Schermerhorn, supra,* 375 U.S. at 102–103; *Local 34, Int'l Molders (Daniel Garczynski)*, 150 NLRB 913, 916–919 Quarterly Report of the General Counsel for the First Quarter of 1975, 89 LRR 199–200. Cf. Lab. Rels. Yearbook (1972) 213–214; but see *United Steelworkers (Capitol Foundry Div.)*, 199 NLRB 153. The Board therefore does not have primary jurisdiction in cases of this sort.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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